No. 91-1526

In the Supreme Court of the United States

OCTOBER TERM, 1992

FERRIS J. ALEXANDER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

MICHAEL E. O'NEILL
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the post-trial forfeiture provisions of RICO violate the First Amendment when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive materials.

2. Whether the fofeiture of petitioner's property resulting from his RICO convictions was disproportionate to his crimes, in violation of the Eighth Amendment.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-26, is reported at 943 F.2d 825.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. A petition for rehearing was denied on October 30, 1991. On February 19, 1992, Justice Blackmun extended the time for filing a petition for a writ of certiorari to March 16, 1992. The petition was filed on that date and was granted on June 29, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

After a four-month jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conspiring to defraud the United States by impeding the lawful functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371; two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1); one count of receiving and using income derived from a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a); one count of conducting a RICO enterprise, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); 12 counts of transporting obscene material in interstate commerce for the purpose of sale or distribution, in violation of 18 U.S.C. 1465; five counts of engaging in the business of selling obscene material, in violation of 18 U.S.C. 1466; and one count of falsely representing a social security number for the purpose of impeding the IRS, in violation of 42 U.S.C. 408(g)(2). Pet. App. 1-2 & n.1, 127.[1]

[1] Petitioner was convicted in 1970 of conspiring to distribute large quantities of obscene material. See *United States* v. *Manarite*, 448 F.2d 583 (2d Cir.), cert. denied, 404 U.S. 947 (1971); *United States* v. *Alexander*, 498 F.2d 934 (2d Cir. 1974). For that reason, contrary to petitioner's suggestion, Pet. Br. 2-3 n.1, it could not have been a surprise to him that he could be prosecuted under the federal obscenity laws.

Petitioner was sentenced to a total of six years' imprisonment, fined $100,000, and ordered to pay the costs of the prosecution, his incarceration, and his supervised release. In addition, the district court ordered forfeiture of ten of petitioner's commercial real estate properties, as well as the assets of his wholesale business and retail book and video stores, which included the bank accounts, furniture, fixtures, and inventory of those businesses. The court also ordered petitioner to forfeit $8,910,548.10, which constituted the proceeds of his racketeering activity over a four-year period. Pet. App. 127-145. The court of appeals affirmed.

1. For some 30 years, petitioner was engaged in the so-called "adult entertainment" business, selling magazines and sexual paraphernalia, showing films, and selling and renting video cassettes. Petitioner plied his trade in retail stores, rental stores, and movie theaters located throughout Minnesota. The sale and rental of the sexually explicit materials generated millions of dollars in annual revenues. Pet. App. 3, 9.

Petitioner used elaborate means to conceal his wealth. He established sham corporations and used false names and the names of employees in opening bank accounts, obtaining licenses, and responding to state and federal reporting requirements. He also filed false tax returns in 1982 and 1983 that underreported his gross receipts by approximately $2.7 million. Pet. App. 3-7, 25; J.A. 25-88; Gov't C.A. Br. 1.

At the time of his arrest, petitioner's adult entertainment empire included 13 retail stores and a warehouse. Petitioner received shipments of pornographic materials at the warehouse, where the materials were then wrapped in plastic, priced, boxed, and distrib-

uted to his retail outlets. Petitioner testified that he was the sole owner of the 13 retail stores and the wholesale business.[2] The revenue generated by the stores was brought to petitioner at the warehouse and main office. Petitioner placed some of the cash in bank accounts that were used to pay business expenses, and he converted the rest into large denomination bills, cashier's checks, or money orders. Pet. App. 6, 8-9.

The four magazines and three video cassettes that formed the basis of the racketeering and obscenity counts on which the jury convicted petitioner consisted of an unbroken sequence of "hard core" sexual acts. The evidence showed that petitioner distributed multiple copies of these videos and magazines throughout his adult entertainment empire. J.A. 61, 63-66, 69-70, 76-79, 82-87.

2. Following the return of the guilty verdicts, the district court conducted the forfeiture proceeding. The government sought to forfeit the businesses and the real estate that represented petitioner's interest in the enterprise, see 18 U.S.C. 1963(a)(2)(A), and the property that afforded petitioner influence over the enterprise, see 18 U.S.C. 1963(a)(2)(D). The

[2] At sentencing, the district court found that "[t]he evidence at trial demonstrated both to the satisfaction of a very competent Jury and to this Court that the Defendant led almost single handedly a significant ongoing criminal enterprise encompassing numbers of people. The Court will not recount the extensive evidence touching the Defendant's maintenance of control over virtually every phase of the operation, from his use of professionals, to his use of nominees, to his use of secreted items and secreted accounts. The Defendant's activity was absolutely extensive involving scores of individuals over the course of many years." 8/6/90 Tr. 30-31; see also *id.* at 32-34, 36-37.

government also sought to forfeit the assets and proceeds petitioner had obtained as a result of his racketeering offenses, see 18 U.S.C. 1963(a)(1) and (a)(3). In the course of the forfeiture proceedings, the government introduced another 30 magazines and 16 videos that had been seized or purchased from petitioner's stores during the investigation, and another 9 magazines and 400 videos were offered to demonstrate the extent of petitioner's adult entertainment empire. Pet. App. 7-8, 148-150.

The jury found that petitioner had an interest in ten pieces of commercial real estate and 31 current or former businesses, all of which had been used to conduct the enterprise. 40 Tr. 8. Sitting without a jury, the district court then found that petitioner had acquired a variety of assets as a result of his racketeering activities. The court ultimately ordered petitioner to forfeit his wholesale business, the retail businesses (bookstores and video stores), and the sum of $8,910,548.10. The forfeiture order extended to all the business's assets, which included inventory, such as magazines, books, videotapes, and sexual paraphernalia; personal property, such as televisions, video cassette players, and office furniture; and real property. Pet. App. 8-9, 134-146, 151-160.[3]

[3] Contrary to the claim made by amici ACLU *et al.*, ACLU Amicus Br. 25-28, the government promptly notified all interested parties that it was seeking forfeiture. The government published a general notice of the forfeiture order and of its intent to dispose of the property pursuant to 18 U.S.C. 1963. Docket No. 194. On August 9, 1990, the government provided all persons known to have alleged an interest in the property with direct notice of the order and its intent to dispose of the property pursuant to 18 U.S.C. 1963. Docket No. 297.

3. On appeal, petitioner argued that the forfeiture of non-obscene expressive material under the RICO statute violates the First Amendment. The court of appeals rejected that claim. Relying on the Fourth Circuit's decision in *United States* v. *Pryba*, 900 F.2d 748, cert. denied, 111 S. Ct. 305 (1990), the court held that forfeiture of such material under the RICO forfeiture statute does not violate the First Amendment as long as "there is a nexus established between the ill-gotten gains from racketeering activity and the protected materials forfeited." Pet. App. 21. The court distinguished between a prior restraint and a criminal penalty imposed after a lawful racketeering conviction. *Id.* at 21-22. While the court recognized that the RICO forfeiture provisions could have some chilling effect on the exercise of First Amendment rights, the court explained that "deterrence of the sale of obscene materials is a legitimate end" of anti-obscenity laws and that any criminal sanction on obscenity is likely to have some inhibiting effect on the dissemination of expressive material. *Id.* at 22.

Petitioner also claimed that the forfeiture order violated the Eighth Amendment's ban on cruel and unusual punishments and excessive fines. The court rejected that claim. The court noted that in *Pryba* the Fourth Circuit held that the Eighth Amendment was not violated by the forfeiture of a business with total annual sales of approximately $2 million, in which the forfeiture resulted from the seizure of obscene material worth $105.30. Pet. App. 24-25. The court held that in this case, "[w]e cannot conclude

that the district court abused its discretion in sentencing [petitioner]." Pet. App. 25.[4]

SUMMARY OF ARGUMENT

I. The forfeiture in this case was not a prior restraint on future speech, but a penalty for past racketeering offenses. This Court's cases have made clear that, except in the most unusual circumstances,

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[4] Petitioner complains that the government sold his real property "as quickly as it could," even though he was pursuing an appeal from his convictions and the forfeiture order. Pet. Br. 6. Petitioner could have sought a stay of the district court's forfeiture order pending appeal under Fed. R. Crim. P. 38(e), but he did not do so. He argues that 18 U.S.C. 1963(f) bars a stay application by a defendant in a RICO forfeiture case, but that is not so. Section 1963(f) merely enables a third party to seek a stay when it has interests in a forfeiture action that would be put at risk; a defendant already has that right under Rule 38(e). To be sure, in light of his actions during the two months between the verdict and sentencing, petitioner might not have been able to obtain a stay without posting a significant monetary bond. During that period, petitioner transferred tons of inventory from his stores and warehouse to other locations in Minnesota and California in an effort to prevent the government from taking possession of the assets of the forfeited businesses. The district court found that he had failed to deposit sales proceeds in designated banks as ordered by the court. The district court therefore revoked petitioner's release and forfeited his $50,000 bond. 8/30/91 Order; 8/10/90 Tr. 8-69. Absent a stay of the forfeiture order, the Marshal acted within his authority to dispose of the forfeited property and to do so in a manner that he deemed to be in the government's best interest. See *United States* v. *Til's Cocktail Lounge*, 873 F.2d 141, 144 (7th Cir. 1989); *United States* v. *Aiello*, 912 F.2d 4 (2d Cir. 1990), cert. denied, 111 S. Ct. 757 (1991); *United States* v. *Certain Real & Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991).

prior restraints on speech are impermissible: The government may not forbid expressive activity in the future, but must instead wait until it has occurred and then, if it is not constitutionally protected, punish the activity after the fact.

That is what the RICO forfeiture statute does, and that is precisely what was done in this case. Petitioner was not enjoined from engaging in the distribution of expressive materials. Instead, he was punished for engaging in racketeering violations by a prison term, a fine, and a forfeiture of assets linked to his racketeering activities. The forfeiture may have the effect of limiting petitioner's ability to resume his business of distributing "adult entertainment" materials in the future, but a prison term or a fine could have the same effect, and petitioner concedes that those penalties do not constitute prior restraints.

Petitioner seeks to limit the breadth of his submission by arguing that a forfeiture constitutes a prior restraint only when it is imposed for a racketeering offense that is based exclusively on obscenity violations, and when the effect of the forfeiture is "immediately or inevitably [to] suppress speech." Pet. Br. 30. But that definition would make the constitutional status of a particular remedy turn on the hardihood of the defendant. Although petitioner concedes, as he must, that fines and prison terms for past conduct are not "prior restraints," a large fine or a long prison term could "immediately" suppress further expressive activities by an offender with marginal resources or one who lacks other associates to carry on his business in his absence.

This Court's decisions do not support petitioner's definition of prior restraint. To the contrary, the Court has held that a criminal sanction for unprotected conduct is not constitutionally suspect simply because it "will have some effect on the First Amendment activities of those subject to sanction." *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706 (1986). Because the forfeiture in this case was imposed as a penalty for past racketeering activity, it was not a prior restraint subject to a presumption of constitutional invalidity.

The forfeiture order in this case was also not constitutionally overbroad. Petitioner argues that the forfeiture of assets in a case such as this is constitutionally invalid because it will discourage others from engaging in protected expressive activities on account of fear that they will be subjected to a similar sanction. But the protection against the "chilling effect" of criminal sanctions for obscenity lies in the definition of the substantive offense. This Court has defined obscenity with sufficient specificity that persons attempting to engage in lawful speech should have no difficulty in doing so. And even if there is some marginal chilling of protected speech close to the constitutional line, the Court has held that the Constitution does not prohibit the use of any sanction that will produce some chilling of protected speech. If it did, prison terms and large fines would never be permissible sanctions for obscenity offenses.

II. The forfeiture in this case was not grossly disproportionate as a penalty for petitioner's racketeering offenses and therefore did not violate the Eighth Amendment. Contrary to petitioner's contention, the RICO forfeiture statute does not constitute a "forfeiture of estate" as that term is used in Article III of the Constitution. RICO forfeits only property that is related to the defendant's activities in connection with the racketeering enterprise. In that respect, it

is akin to traditional forfeiture remedies that Congress has provided in our law since the First Congress; it bears no resemblance to the common law "forfeiture of estate" or "corruption of blood" that the Constitution outlawed.

Petitioner failed to satisfy his burden of showing that the forfeiture here was grossly disproportionate to the magnitude of his crime. Although he now claims that the value of the property forfeited is approximately $25 million, he failed to establish the value of the property in the district court, and in fact it appears likely that the total value of the forfeiture will be much less than that. Moreover, it is misleading for petitioner to characterize the crimes for which he was convicted as being merely seven obscenity offenses. He was convicted of conducting what the district court characterized as "an enormous racketeering enterprise," which he directed over a 20-year period. In light of the nature of the conduct for which he was convicted, petitioner has not demonstrated that the forfeiture in this case is contrary either to principles of proportionality or to the kind of penalty that he could have been assessed in other jurisdictions. The court of appeals therefore properly rejected petitioner's Eighth Amendment claim.

ARGUMENT

I. THE FORFEITURE PROVISIONS OF THE RICO STATUTE DO NOT VIOLATE THE FIRST AMENDMENT, EVEN WHEN THE PREDICATE OFFENSES ARE OBSCENITY VIOLATIONS

Petitioner contends that the forfeiture in this case violated the First Amendment, because the racketeering offense was based on obscenity violations and the forfeited property consisted of the assets of a business that dealt in expressive material. The answers to that contention are straightforward. First, the forfeiture did not constitute an unlawful prior restraint on speech, but was simply part of the punishment for petitioner's racketeering offenses. Second, the forfeiture was not invalid because of its chilling effect on protected speech; the RICO statute regulates only unprotected speech, and the forfeiture sanction does not chill lawful expressive conduct any more than do the severe prison sentences and large fines that can lawfully be imposed for obscenity violations.

A. The Post-Trial Forfeiture Order In This Case Was Not An Unlawful Prior Restraint On Speech

Petitioner does not challenge his obscenity convictions,[5] and he concedes that the items adjudged obscene at trial can be forfeited. He challenges the remainder of the forfeiture, however. Expressive materials cannot be forfeited, he contends, unless they have been found to be obscene. And the assets of businesses dealing in expressive materials cannot be

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[5] The petition did not present such a challenge, and on October 5, 1992, this Court denied petitioner's motion to enlarge the questions presented to add such a claim.

forfeited, he argues, if the forfeiture is based on obscenity violations. According to petitioner, a forfeiture of assets falling in either of those categories constitutes a prior restraint on speech and violates the First Amendment. Pet. Br. 17-35.

1. *A RICO forfeiture order is not a prior restraint on speech*

A prior restraint on speech is "the imposition of a restraint on a publication before it is published," *Black's Law Dictionary* 1074 (5th ed. 1979), and consists of "an advance determination that the distribution of particular materials is prohibited," *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 705-706 n.2 (1986). "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

The RICO forfeiture statute is not a prior restraint on speech within the meaning of that definition. The purpose of the RICO forfeiture provisions is not to suppress speech, but "to remove the profit from organized crime by separating the racketeer from his dishonest gains." *Russello* v. *United States*, 464 U.S. 16, 28 (1983). Thus, the assets at issue in this case are subject to forfeiture under RICO "not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime." *Western Business Systems, Inc.* v. *Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980).[6]

[6] Congress enacted the RICO statute in 1970. Obscenity violations were not initially included among RICO's predicate acts of racketeering. Congress included obscenity offenses in 1984, because by then the manufacture and distribution of obscene materials had become a major activity of organized crime. 130 Cong. Rec. 844 (1984) (Senator Helms) (obscenity had become the "third largest source of income for organized crime").

The RICO statute provides for the forfeiture of any property that was obtained with criminal proceeds or that afforded the defendant a source of influence over a criminal enterprise. 18 U.S.C. 1963. Moreover, the statute authorizes forfeiture only after a judicial determination that the defendant committed a RICO violation. A RICO forfeiture order does not enjoin the defendant from engaging in particular activities in the future; it only deprives the defendant of assets that were related to the commission of the racketeering offenses for which he was convicted.

When expressive materials are the subject of a RICO forfeiture order, it is because of their status as assets related to racketeering violations, not because of their content or expressive nature. The RICO forfeiture statute calls for the forfeiture of assets because of the financial role they played in the operation of the enterprise. The statute does not condemn particular items because they are thought to be obscene, but because of their role in providing financial support and incentives for racketeering activity. Thus, for purposes of RICO forfeiture, assets that happen to be in the form of expressive materials are not treated any differently than non-expressive assets, such as sports cars, narcotics, cash, or securities, that are linked to a racketeering enterprise.

In assessing the constitutionality of the RICO forfeiture statute as applied to this case, it is important

to note that petitioner's illegal conduct did not consist simply of the sale of three obscene books and four obscene videos. Petitioner was responsible for creating and managing an enterprise that was conducted through a pattern of illegal activities. Petitioner spent 29 years establishing the enterprise that enabled him to make shipments of obscene materials, to hide his conduct, and to dispose of the proceeds. Even a stint in prison after being convicted of conspiring to distribute obscene materials, see note 1, *supra*, did not put a halt to petitioner's business, as the district court noted at sentencing. 8 6 90 Tr. 44. The assets forfeited to the government comprised not merely the proceeds of petitioner's racketeering activity, but also his financial interest in the enterprise. The forfeiture of both expressive materials, such as magazines and video cassettes, as well as noncommunicative assets, such as real estate and business equipment, was necessary to deprive petitioner of the proceeds of his illegal conduct and the assets he had acquired and maintained in violation of the RICO statute. See 18 U.S.C. 1963(a)(1), 1963(a)(3). The RICO forfeiture provisions, both in general and as applied in this case, thus operated to punish acts of racketeering in the past, not to prohibit speech in the future.

2. *The First Amendment does not prohibit forfeiture of expressive materials or the assets of a business engaged in expressive activity*

Petitioner concedes that it would be permissible to forfeit his business assets (even assets that included expressive materials) if the business were being used for the sale of drugs or some other non-expressive criminal activities. Pet. Br. 11 n.10. In an apparent effort to make his submission more palatable by limiting its breadth, he challenges the constitutionality of the RICO forfeiture statute only where the forfeiture is predicated exclusively on obscenity violations. Pet. Br. 9, 11 n.10, 29-30. But the logic of his constitutional argument sweeps much more broadly than that: It would outlaw any forfeiture having the effect of suppressing speech that had not previously been adjudged unprotected. Under the rationale of petitioner's constitutional analysis—as opposed to the statement of the position he urges for the purpose of deciding this case—the nature of the predicate racketeering offenses should have no bearing on the constitutionality of the forfeiture.

That the predicate crimes in a particular case are obscenity offenses has nothing to do with whether it is permissible to punish racketeers through the forfeiture of "expressive" or "presumptively protected" assets. If a forfeiture violates the First Amendment, it is not because of the nature of the predicate crimes, which can be, and are, severely punished by other laws; it is only because the forfeiture impermissibly curtails speech. But if a forfeiture has that effect, it is equally unconstitutional whether the predicate offenses were obscenity or drug violations; in either case, when otherwise protected assets are forfeited, the same curtailment of speech occurs. On the other hand, if the forfeiture of non-obscene expressive materials or the assets of a business engaged in expressive activities does not *per se* offend the Constitution, the use of forfeiture as a criminal sanction is not rendered unconstitutional simply because some or all of the predicate racketeering acts consist of obscenity offenses, rather than other crimes.

The question for decision, therefore, is whether the Constitution imposes a *per se* rule against punishing

criminal conduct by forfeiting nonobscene expressive materials (such as books or films), or materials that have some relation to the exercise of free speech (such as film projectors, video cassette players, or real property used for bookstores). That question must be answered in the negative.

This Court has recognized that the First Amendment does not protect purveyors of obscenity from severe criminal sanctions. See *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 59 n.8 (1989); *Smith* v. *United States*, 431 U.S. 291, 296 n.3 (1977); *Ginzburg* v. *United States*, 383 U.S. 463, 464-465 n.2 (1966). The States and the federal government are free to enact obscenity laws and select a variety of criminal penalties and other remedies for their violation. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57 (1973); *Roth* v. *United States*, 354 U.S. 476, 485-487 (1957); *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957). Like Congress, a number of States have concluded that obscenity violations should be included as predicate offenses under state versions of the RICO statute, and that forfeiture of property is a legitimate means of enforcing such laws.[7] No constitutional

[7] See Ariz. Rev. Stat. Ann. § 13-201 (West Supp. 1991); Colo. Rev. Stat. Ann. §§ 18-17-103(5)(b)(VI), 18-17-105(1)(b), 18-17-106(2) (West Supp. 1991); Conn. Gen. Stat. Ann. §§ 53-394, 53-397 (Supp. 1991); Del. Code Ann. tit. 11 §§ 1502(9)(a)(7), 1504(b), 1505(b) (Supp. 1991); Fla. Stat. Ann. §§ 895.02(1)(a)(29), 895.02(2)(a) (West Supp. 1991); Ga. Code Ann. §§ 16-14-3(9)(A)(xii), 16-14-6(a)(5), 16-14-7(a) (Supp. 1991); Idaho Stat. Ann. §§ 18-7803(a)(8), 18-1704(f) (Supp. 1991); Ind. Code Ann. §§ 34-45-6-1(2)(4), 34-4-30.5-3 (West Supp. 1991); Mo. Stat. Ann. § 207.360 (1992); N.J. Stat. Ann. §§ 2C:41-1(e), 2C:41-3, 2C:41-4(a)(9) (West Supp. 1991); N.C. Gen. Stat. §§ 75-D-3(c)(2), 75-8 (Supp. 1991); Orio Rev. Code Ann. § 2923.31 (Anderson

principle prohibits Congress from providing enhanced penalties, such as severe prison sentences, fines, and forfeitures, for repeated or large-scale violations of obscenity laws or for violations that are part of a pattern of racketeering activity. And no constitutional principle prohibits the government from employing those penalties even though they may have the effect of burdening the operation of businesses engaged in expressive activities.

To grant expressive materials and businesses engaged in expressive activity an immunity from forfeiture sanctions would create a variety of practical and doctrinal difficulties. For example, if this Court were to adopt a rule banning the forfeiture of adult entertainment businesses, those businesses would become even more attractive targets for racketeers than they already are. See *United States* v. *Pryba*, 900 F.2d at 755; 2 United States Dep't of Justice, *Attorney General's Comm'n on Pornography: Final Report* 1053 (1986) ("organized crime * * * exerts substantial influence and control over the obscenity industry"). As the Fourth Circuit put it, to bar the forfeiture of assets of businesses engaged in expressive activity "would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations. Carried to its logical end, this reasoning would allow the Colombian drug lords to pro-

1992); Okla. Stat. Ann. tit. 22 §§ 1402(10)(v), 1405(A) (West 1991); Or. Rev. Stat. Ann. § 166.715 (1992); P.R. Laws Ann. tit. 25 § 971(a) (1992); Texas Penal Code § 71.02 (Vernon 1992); Utah Code Ann. § 76-10-1602 (1992); Wash. Rev. Code Ann. §§ 9A.82.010(14)(s), 9A.82.100(4)(f) (1991); Wis. Stat. Ann. §§ 946.82(4), 946.86(1), 946.87(2)(a) (West 1991); cf. Cal. Penal Code § 186.2 (West 1992) (limited to child pornography).

tect their enormous profits by purchasing the New York Times or the Columbia Broadcasting System." *United States* v. *Pryba*, 900 F.2d at 755.

Moreover, petitioner's definition of a prior restraint would create an unworkable constitutional test. It is unclear whether petitioner's definition of prior restraint would invalidate all forfeitures directed at businesses involved in expressive activities, and it is unclear why it would not apply, at least in some cases, to fines and prison sentences. Petitioner argues that a forfeiture is a prior restraint because it "will immediately or inevitably suppress speech." Pet. Br. 29-30. He argues that the forfeiture in this case was a prior restraint on speech because it resulted in depriving petitioner of books and videotapes that he intended to offer for resale; because it deprived him of real and personal property that he had used and intended to continue using in his adult entertainment business; and because the forfeiture of the past proceeds of the business "will unquestionably force its closure" in the future. Pet. Br. 21. But a forfeiture of *any* assets of a company that is engaged, in whole or in part, in expressive activity may make it more difficult for the company to engage in expressive activities in the future. Yet it is highly unlikely that the forfeiture of only a small portion of the business's assets would "immediately or inevitably suppress speech." Depending on the profitability of the business, a forfeiture could be regarded in some cases as simply a cost of doing business that would have no appreciable effect on the production or marketing of expressive materials. Thus, under petitioner's test, it would be very difficult to determine whether a particular forfeiture constituted a prior restraint or not.

It is also difficult to justify petitioner's distinction between a forfeiture, which petitioner considers a prior restraint, and other penalties, which he concedes are not prior restraints and therefore can constitutionally be imposed for racketeering or obscenity offenses. Racketeering offenses carry a maximum penalty of 20 years' imprisonment; obscenity violations carry a maximum penalty of 5 years' imprisonment; and each commission of either offense can also result in a fine of up to $250,000. A large fine would have many of the same effects on a defendant's business as a forfeiture of assets. Like the forfeiture of business proceeds, the fine would divert resources from the business, and it would impair the defendant's ability to obtain the personal and real property necessary to operate the business. A lengthy jail term for the principal in an obscenity business would have similar effects. Yet petitioner concedes, as he must, that "typical jail sentences or fines for obscenity violations remain valid." Pet. Br. 30. See *Fort Wayne Books*, 489 U.S. at 59-60; *Polykoff* v. *Collins*, 816 F.2d 1326, 1337-1340 (9th Cir. 1987); *511 Detroit Street, Inc.* v. *Kelly*, 807 F.2d 1293, 1298-1299 (6th Cir. 1986), cert. denied, 482 U.S. 928 (1987).

Petitioner's own discussion of the difference between a forfeiture and other criminal sanctions shows why his distinction does not stand up to analysis. Petitioner argues that if his punishment had been limited to six years' imprisonment and a $100,000 fine, "his ten businesses would have surely remained open to the public." Pet. Br. 30. But that is merely to suggest that petitioner had sufficient assets (and enough cohorts) to continue his operations in spite of the prison term and fine. If the fine were larger, or if petitioner had fewer resources, the fine and term of imprison-

ment alone might have disabled him from continuing his business or discouraged him from doing so. Certainly a small forfeiture would be less likely to "suppress speech" in that manner than a large fine and prison term.

Because petitioner's definition of a prior restraint appears to turn on the effect of the sanction on the person against whom it operates, the same penalty could be a prior restraint in one case (where it was sufficient to discourage the defendant from engaging in further expressive activity) and not a prior restraint in another (where it did not have that effect). Any attempt to determine in advance the likely effect of a particular penalty on a particular defendant would be highly speculative.

Such an *ad hoc* definition of the term "prior restraint" would be unworkable as a test for the constitutional validity of particular criminal sanctions. As we show below, it is also inconsistent with this Court's cases describing prior restraints and analyzing their status in First Amendment law.

3. *This Court's decisions do not support petitioner's constitutional analysis*

In setting forth his claim that the forfeiture order in this case was a prior restraint on speech, petitioner relies principally on the leading "prior restraint" case from this Court, *Near* v. *Minnesota*, 283 U.S. 697 (1931). *Near*, however, involved a very different kind of remedy—a true injunction or "restraint." Its rationale does not extend to a penalty provision such as the forfeiture at issue in this case.

In *Near*, a state law provided that the publication or sale of "malicious, scandalous and defamatory" periodicals constituted a nuisance and could be enjoined under a state nuisance abatement law. Near

published a newspaper that contained articles ridiculing local government officials. The state court found the articles "malicious, scandalous and defamatory," and on that ground adjudged the newspaper a public nuisance. The court issued an order perpetually enjoining Near from producing any malicious, scandalous and defamatory publication or continuing to conduct the nuisance under the name and title of the newspaper. 283 U.S. at 704-706.

This Court struck down the injunction. The Court held that the object of the statute "[was] not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." 283 U.S. at 711. The statute embodied "the essence of censorship," *id.* at 713, because it allowed a court, upon finding that a newspaper had published defamatory matter, to enjoin further publication. The injunction exposed Near to contempt if any further publication were found to be defamatory, *i.e.*, if Near could not satisfy the court that the published matter was "true and * * * published with good motives and for justifiable ends." *Id.* at 713. Under those circumstances, this Court concluded that the injunction constituted a prior restraint on speech that violated the First Amendment. *Id.* at 713-723.[5]

Unlike the defendant in *Near*, petitioner is free to engage in the production and distribution of expressive materials in the future. The judgment in this case imposes no legal impediment to petitioner's opening another bookstore or otherwise engaging in the production and distribution of expressive material.

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[5] The Court added that "we have no occasion to inquire as to the permissible scope of subsequent punishment," 283 U.S. at 715, and it noted that its ruling did not deal with obscene materials, *id.* at 716.

See *United States* v. *Pryba*, 674 F. Supp. 1502, 1503 (E.D. Va. 1987), aff'd, 900 F.2d 748 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990). To be sure, petitioner will not be opening that new business with the proceeds from the old one—the one that he used to sell obscene materials. But the forfeiture judgment does not bar him from distributing any material he chooses, and it does not require him to obtain prior approval for any expressive activities in which he chooses to engage. See *Arcara* v. *Cloud Books, Inc.*, 478 U.S. at 705-706 n.2.

Petitioner also relies on this Court's decision in *Fort Wayne Books, Inc.* v. *Indiana*, *supra*, but that case does not help him. In *Fort Wayne Books*, this Court struck down the pretrial seizure of the contents of several adult bookstores alleged to be engaged in the sale of obscene books and magazines. The State had filed a civil action alleging that the bookstores had violated the state RICO statute by engaging in a pattern of racketeering activity consisting of repeated violations of state law barring the sale of obscene materials. Before trial, the State obtained an order forfeiting the bookstores and their contents.

This Court reversed. The Court explained that the elements of a RICO violation and the basis for forfeiture had not yet been proved. As the Court noted, "the petition for seizure and the hearing thereon were aimed at establishing no more than *probable cause to believe* that a RICO violation had occurred, and the order for seizure recited no more than probable cause in that respect." 489 U.S. at 66 (emphasis in original). Probable cause to believe a legal violation had occurred, the Court held, "is not adequate to remove books or films from distribution." *Ibid.* Because "it remained to be proved whether the seizure was actually warranted" under the Indiana statutes, *id.* at 67, the Court held the pretrial seizure premature.

The Court in *Fort Wayne Books* assumed without deciding that "bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the State's obscenity laws." 489 U.S. at 65. Although the Court did not resolve that issue, nothing in the Court's opinion suggests that a forfeiture order cannot be enforced as a criminal sanction in a case such as this one, where the defendant has enjoyed a full trial on the merits and the government has proved beyond a reasonable doubt every element of the underlying criminal offense and the forfeitability of the assets in question. In that setting, no constitutional principle holds that the forfeiture order cannot be enforced if the subject of the order is engaged in expressive activities or some of the forfeited assets consist of expressive materials.

Vance v. *Universal Amusement Co.*, 445 U.S. 308 (1980), *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), and *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), cited by petitioner, Pet. Br. 27, all of which were decided before *Fort Wayne Books* and *Arcara*, plainly do not resolve the question that the Court left open in *Fort Wayne Books* itself. Those cases, like the lower court cases cited at pages 31-32 of petitioner's brief, involved materials that were seized or otherwise restrained without a judicial determination that they were obscene. A RICO forfeiture order does not need to be premised on a judicial determination that all the seized materials are obscene, because it is not designed to forfeit property on the ground that it is contraband. The assets in this case were ordered

forfeited not because they were believed to be obscene, but because they were part of the financial resources of a criminal enterprise. The government was not acting as a censor, but as the collector of assets used in a crime. The fact that the forfeiture may make it more difficult for petitioner to resume his activities in the adult entertainment business does not convert the forfeiture order into a prior restraint.[9]

Arcara v. *Cloud Books, Inc.*, *supra*, illustrates that point well. In *Arcara*, state law authorized the closure of any building that was used as a place of prostitution. The owners of an adult bookstore allowed their establishment to be used for that purpose, and the county obtained an order closing the store. The state court held that the statute was not the "least restrictive means" for dealing with the problem and therefore could not constitutionally be applied to the bookstore without running afoul of the First Amendment.

This Court reversed on the ground that "the sexual activity carried on in this case manifests absolutely no element of protected expression." 478 U.S. at 705. The Court observed that "we have not traditionally subjected every criminal and civil sanction

[9] Federal courts of appeals, including the court in this case, have held that a RICO forfeiture does not constitute a prior restraint, even if the forfeiture is based on obscenity violations. *Adult Video Ass'n* v. *Barr*, 960 F.2d 781, 788-790 (9th Cir. 1992); *United States* v. *Pryba*, 900 F.2d at 753-756; see *Sequoia Books, Inc.* v. *Ingemunson*, 901 F.2d 630, 634-638 (7th Cir.) (upholding Illinois obscenity forfeiture statute against First Amendment challenge), cert. denied, 111 S. Ct. 387 (1990); cf. *American Library Ass'n* v. *Barr*, 956 F.2d 1178, 1190-1191 (D.C. Cir. 1992) (suggesting without deciding that forfeiture under the Child Protection and Obscenity Act of 1988 would not violate First Amendment).

imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction." *Id.* at 706. Instead, the Court explained that it has "subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in [*United States* v.] *O'Brien*, [391 U.S. 367 (1968)] * * * or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity * * *." *Id.* at 706-707. "Bookselling in an establishment used for prostitution," the Court explained, "does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises." *Id.* at 707.

Under the Court's analysis in *Arcara*, the forfeiture in this case cannot be said to be a prior restraint on speech or to violate the First Amendment in any other respect. The forfeiture order does not prohibit petitioner from distributing materials at new bookstores or video stores. See 478 U.S. at 705-706 n.2. And the conduct that "drew the legal remedy in the first place"—racketeering committed through obscenity violations—was not protected expressive conduct.[10]

[10] The Court in *Arcara* made clear that "conduct with a significant expressive element" refers to action with a substantial speech component, such as the protest activity involved in *O'Brien*, the demonstration involved in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), or the distribution of literature in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). Obscenity is not "conduct with a significant expressive element," but is expressive activity that falls outside the protection of the First Amendment. And even if the expressive

Moreover, the RICO forfeiture statute does not have "the inevitable effect of singling out those engaged in expressive activity." The statute reaches a wide variety of criminal conduct, most of which has no expressive component at all. Finally, the statute does not specifically target expressive materials for forfeiture. It is only because petitioner's assets included expressive materials that the forfeiture reached presumptively protected materials at all; if petitioner had not been in posssion of any magazines or films at the time of the forfeiture order, but had maintained his interest in the enterprise through other assets, the forfeiture order would simply have reached those other assets and would not have included any expressive materials.[11]

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activity at issue in this case is deemed sufficient to bring this case within the reach of *O'Brien* and its progeny, the forfeiture order in this case is still valid: The forfeiture statute is facially neutral; forfeiture serves the important governmental interest of depriving racketeers of the fruits of their criminal conduct; that interest is not related to the suppression of free speech; and it is not apparent that that interest can be served more effectively by means other than the forfeiture of the racketeer's interest in the racketeering enterprise. See *Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461 (1991); *United States* v. *Albertini*, 472 U.S. 675, 687-689 (1985); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293-294 (1984).

[11] A different case would be presented if a defendant could show that the forfeiture of his business was sought as a pretext for suppression of speech protected by the First Amendment. See *Arcara*, 478 U.S. at 707 n.4; *id.* at 708 (O'Connor, J., concurring). A defendant would have the burden of proof on any such claim and would have to overcome a presumption that a charging decision was made in good faith. See *Caplin & Drysdale* v. *United States*, 491 U.S. 617, 634-635 (1989); *Arcara*, 478 U.S. at 707 n.4. Petitioner

In sum, petitioner's effort to characterize the RICO forfeiture statute as a prior restraint on speech is inconsistent with this Court's decisions and would require the Court to adopt a definition of prior restraint that would be unworkable in many cases. The proper approach, we submit, is to adhere to this Court's traditional characterization of a prior restraint as a directive forbidding speech in the future. A punishment for past criminal conduct, whether in the form of imprisonment, a fine, or a forfeiture, is not a prior restraint and therefore is not constitutionally suspect.[12]

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asserts that the government sought forfeiture in this case "for the improper purpose of destroying both protected sexually oriented expression to which it is overtly hostile as well as unprotected expression * * *." Pet. Br. 25 n.22, 25-26. Amici ACLU *et al.* make a similar claim. ACLU Amicus Br. 4-8. No such finding was made at trial, however, and in this Court petitioner has pointed to no substantial evidence to support his claim of bad faith.

Petitioner suggests that the Marshal's destruction of the forfeited books and tapes illustrates "the executive branch's censorial purpose." Pet. Br. 25 n.22. Yet the Marshal's decision that it would be better to destroy the materials than sell them to members of the public does not indicate that the purpose of the forfeiture was to suppress constitutionally protected materials. Rather, it indicates only that the government did not wish to go into the business of selling sexually explicit materials—regardless of whether they were legally obscene—and did not wish to undertake the burden of storing the materials indefinitely.

[12] There is no merit to the argument of amici American Library Association (ALA) *et al.* that the RICO forfeiture statute should be held unconstitutional because it creates an undue risk of discriminatory enforcement. ALA Amicus Br. 24-29. A defendant who believes that he has been a victim

B. The Post-Trial Forfeiture Provisions Of RICO Are Not Overbroad

Petitioner argues that the forfeiture provisions of the RICO statute are constitutionally overbroad, because they are not limited solely to obscene materials and the proceeds from the sale of such materials. Pet. Br. 35-39.

The overbreadth doctrine allows a defendant to make a facial challenge to an overly broad law restricting speech, even if his own conduct could be regulated under a more narrowly drawn statute. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). The RICO statute, however, does not criminalize constitutionally protected speech and thus is materially different from the statutes involved in the cases petitioner cites. For that reason, petitioner's claim is not that the RICO statute is overbroad because it outlaws protected as well as unprotected speech; rather, his claim is that applying RICO's criminal forfeiture pro-

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of selective prosecution has the opportunity to prove his case; that is all the law requires.

Amici American Booksellers Foundation (ABF) *et al.* make the related claim that it is unlawful to forfeit and destroy materials that are presumptively protected under the First Amendment, because those materials might not be obscene under the standards of a different geographic community. ABF Amicus Br. 20-22. That argument does not affect the forfeiture of real property, non-expressive personal property (such as trucks and furniture), and money. But even so limited, that argument can be answered in the same way as petitioner's challenge to the Marshal's action. The government has no constitutional obligation either to sell or retain material that it owns; the government is not required to go into the business of distributing sexually oriented materials to the public, even if the materials have not been adjudged obscene.

visions to businesses that deal in expressive materials will deter others from engaging in protected speech. That will occur, he argues, because businesses will be compelled to engage in self-censorship not only to avoid criminal liability, but also to avoid the potential forfeiture of their financial enterprises.

In effect, petitioner asks this Court to reconsider a basic premise of its obscenity jurisprudence: that obscene materials can be subjected to criminal sanctions without causing an unacceptable restraint on protected speech. As this Court explained in *Miller* v. *California*, 413 U.S. 15, 35-36 (1973), "[w]e do not see the harsh hand of censorship of ideas—good or bad, sound or unsound—and 'repression' of political liberty lurking in every state regulation of the commercial exploitation of human interest in sex." State and federal law enforcement officials have undertaken numerous obscenity prosecutions since this Court's 1957 decision in *Roth* v. *United States*, 354 U.S. 476, yet there is no lack of so-called "adult" materials in the marketplace. Petitioner's own adult entertainment empire is a testament to that fact.[13]

In the end, petitioner's argument is with *Miller* itself and with Congress's decision to criminalize the interstate distribution of obscene material. See 18 U.S.C. 1465. Taken to its logical end, petitioner's "chilling" argument would effectively overturn the Court's decision in *Miller*, because the existence of

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[13] Petitioner asserts that the effect of the forfeitures in this case has been to eliminate virtually all outlets for erotic materials from the Minneapolis/St. Paul area. Pet. Br. 4, 20. That assertion is contrary to the testimony of petitioner's own expert, who stated that there were 104 stores in the Minneapolis/St. Paul area where "adult" videos were soid. 26 Tr. 46-51.

any sort of criminal penalty, no matter how insignificant, could conceivably chill those who deal in erotic materials. See *Smith* v. *California*, 361 U.S. 147, 154-155 (1959).

The petitioners in *Fort Wayne Books* made precisely that claim, arguing that the application of a state RICO statute to obscenity violated the First Amendment because "the sanctions imposed on RICO violators are so 'draconian' that they have an improper chilling effect on First Amendment freedoms." 489 U.S. at 59. The Court rejected that argument. The Court acknowledged that the prison sentence and fine authorized by the state RICO statute were more severe than the ones authorized for a simple obscenity crime and that, as a result, "some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves." 489 U.S. at 60. But the Court went on to find that "deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" *Ibid.* (quoting *Smith*, 361 U.S. at 154-155). The Court added that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional." *Ibid.*

The analysis in *Fort Wayne Books* is fully applicable here. The mere possibility of self-censorship flowing from the use of a prosecutorial weapon such as post-trial forfeiture does not mean that the use of such a tool must be disallowed. As this Court made clear in *Fort Wayne Books*, "[i]t is not for this

Court . . . to limit the State in resorting to various weapons in the armory of the law." 489 U.S. at 60 (quoting *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957)). This Court has already undertaken to safeguard First Amendment interests by carefully defining the boundary between protected speech and obscenity in *Miller* and related cases. To go further and limit the penalties that can be imposed on those in the business of purveying obscenity would be an inappropriate form of double counting. Cf. *Calder* v. *Jones*, 465 U.S. 783, 790 (1984) (noting that the "potential chill on protected First Amendment activity" has been "taken into account in the constitutional limitations on the substantive law"; declining to adopt additional restrictions for personal jurisdiction).

This Court's decision last Term in *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991), does not support petitioner's overbreadth analysis. *Simon & Schuster* held unconstitutional the New York "Son of Sam" law, which required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account to be made available to the victims of the crime and the criminal's other creditors. The law impermissibly created a financial disincentive to the exercise of First Amendment rights, the Court determined, by "singl[ing] out income derived from expressive activity for a burden the State places on no other income," and by targeting "only * * * works with a specified content." 112 S. Ct. at 508.

Unlike the "Son of Sam" law, the forfeiture provisions of the RICO statute do not target expressive activity; they merely deny defendants the enjoyment

of assets derived from or used in illegal activities. What is more, the racketeering statute is limited to defendants convicted of crimes and to the profits they obtain from their racketeering activities. See 112 S. Ct. at 511 ("Son of Sam" law did not require a conviction and was not limited to proceeds of criminal activities). This Court acknowledged in *Simon & Schuster* that the government has a "compelling interest" in taking the profit out of crime. *Id.* at 510. That is precisely the purpose of the RICO forfeiture statute.

Nor is the threat of forfeiture any more "chilling" than the threat of a prison term or a fine. Imprisonment places an enormous restraint on a person's opportunity for speech, see *Pell* v. *Procunier*, 417 U.S. 817 (1974), to say nothing of his prospects for maintaining an outside business venture while he is in prison, yet petitioner cannot dispute that obscenity crimes can be punished by imprisonment. Here, petitioner received a six-year prison term and a $100,000 fine.[14] As we have noted, petitioner faced even greater potential penalties: If the indictment had charged him only with obscenity offenses, petitioner would have been subject to 60 years' imprisonment and a $3 million fine.[15] Given petitioner's advanced age,

[14] In addition, the district court imposed a $950 special assessment; the costs of incarceration, calculated at $1,415.56 per month; the costs of supervised release, calculated at $96.66 per month; and the costs of prosecution, determined to be $29,737.84.

[15] Petitioner faced a maximum cumulative sentence of 171 years' imprisonment and approximately $6,400,000 in fines. Gov't C.A. Br. 54. Petitioner could have received 60 years' imprisonment and fines totalling $750,000 on the RICO counts alone. *Ibid.*

Pet. Br. 4, the prospect of being imprisoned for 60 years should have had a chilling effect far greater than the possibility of any sort of forfeiture. Just as a fine "cannot approximate in severity the loss of liberty that a prison term entails," *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 542 (1989), the forfeiture of petitioner's business inventory pales in comparison with the threat of such a lengthy prison term.

The Court has tolerated some degree of voluntary self-censorship as a consequence of governmental efforts to control obscenity. At the same time, the Court has sought to limit such censorship by strictly defining obscenity and by ensuring that each obscenity statute requires proof that a defendant was aware of the nature of the materials he was distributing. See *Hamling* v. *United States*, 418 U.S. 87, 123 (1974); *Mishkin* v. *New York*, 383 U.S. 502, 511 (1966); *Smith* v. *California*, 361 U.S. at 152-155. But as long as an obscenity law meets those requirements, significant penalties may be imposed for the distribution of obscene materials. See, *e.g.*, *Fort Wayne Books*, 489 U.S. at 59-60 (upholding state RICO statute); *Roth* v. *United States*, 354 U.S. at 479 n.1 (upholding federal obscenity law with penalties of up to five years' imprisonment and a $5,000 fine); *Ginzburg* v. *United States*, 383 U.S. at 464 n.2 (same). If the chill felt by persons from the risk of being imprisoned for the distribution of obscene materials does not offend the First Amendment, neither does the chilling effect that the RICO forfeiture law may have, even on parties who are in that business. See *Arcara*, 478 U.S. at 705 ("neither the press nor booksellers may claim special protection from governmental regulations of general applica-

bility simply by virtue of their First Amendment protected activities").[16] In addition, before a forfeiture judgment can be entered there must be a finding that property was purchased with proceeds from the illegal enterprise, or was used to exert control over the racketeering activity. The mere prospect of a forfeiture, then, is not sufficient to have an unacceptable chilling effect on protected speech.[17]

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[16] See also *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972) (otherwise valid laws may be enforced against the press as against other citizens even though such enforcement has the potential marginally to reduce the circulation of information); *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws.").

[17] *NAACP* v. *Alabama*, 377 U.S. 288 (1964), the case that petitioner identifies as "[p]erhaps most directly analogous" to this one on the overbreadth issue, Pet. Br. 38, has little in common with this case. There, the State sought to bar the NAACP from conducting business in Alabama because of its support for the Montgomery bus boycott. The Court concluded that, even assuming that conduct violated a valid state law, "such a violation could not constitutionally be the basis for a permanent denial of the right to associate for the advocacy of ideas by lawful means." 377 U.S. at 307. In this case, petitioner has not been enjoined from continuing his involvement in the adult entertainment business. While the criminal penalties for his racketeering activities have doubtless made it more difficult for him to do so, the difference between penalizing past criminal conduct and barring speech-related conduct in the future is, once again, a critical distinction under the First Amendment analysis. *NAACP* v. *Alabama* is therefore inapposite for the same reason that prior restraint cases such as *Near* v. *Minnesota*, *supra*, are inapplicable to the forfeiture in this case.

II. THE FORFEITURE IN THIS CASE DOES NOT VIOLATE THE EIGHTH AMENDMENT

Petitioner argues that his sentence violates the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments. Pet. Br. 40-49.[18] He does not challenge his six-year prison term, nor does he attack his fine or the requirement that he pay the costs of his prosecution, his incarceration, and his supervised release. Rather, he argues only that the magnitude of the forfeiture, by itself or atop his other penalties, is disproportionate to the gravity of his crimes.

A. The RICO Forfeiture Provisions Are Not Facially Unconstitutional

Petitioner argues that the RICO forfeiture provisions are facially unconstitutional since they are the modern-day version of the "forfeiture of estate" that the Framers outlawed in Art. III, § 3, Cl. 2. Pet. Br. 43-44. A RICO forfeiture, however, is not remotely similar to a common law forfeiture of estate.

RICO requires forfeiture of property that an offender acquired or maintained through a pattern of racketeering activity (or a conspiracy to commit such activity); property that gives an offender a source of influence over a racketeering enterprise; and property constituting, or derived from, the proceeds of racketeering activity. 18 U.S.C. 1963(a)(1)-(3). Forfeiture under RICO is thus limited to property linked to racketeering activity. By contrast, the common law forfeiture of estate divested felons and traitors

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[18] We agree with petitioner that a RICO forfeiture can be examined under the Eighth Amendment, since Congress by statute has made forfeiture a criminal punishment.

of all real and personal property, disentitled children to inherit the property of their parent, and corrupted the blood of the felon or traitor, thereby barring any descendant from tracing a line of inheritance through him. Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 Cornell L. Rev. 768, 770, 773-774 (1977). The Framers outlawed that brand of forfeiture, not forfeitures related to illegal conduct, which have been a part of our law since the time of the Framers. See *United States* v. *Grande*, 620 F.2d 1026, 1037-1039 (4th Cir.), cert. denied, 449 U.S. 919 (1980).[19]

Forfeiture traces its roots to early Roman, Greek, and Biblical law.[20] Colonial courts regularly exercised *in rem* jurisdiction to enforce English and local forfeiture laws against goods and vessels used in violation of the customs and revenue laws. Statutes

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[19] The courts that have addressed the issue have uniformly held that criminal forfeitures do not violate Art. III, § 3, Cl. 2. See *United States* v. *Grande*, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 919 (1980); *United States* v. *Pryba*, 674 F. Supp. at 1517; *United States* v. *Anderson*, 637 F. Supp. 632, 634 (N.D. Cal. 1986), rev'd on other grounds *sub nom. United States* v. *Littlefield*, 821 F.2d 1365 (9th Cir. 1987); *United States* v. *Thevis*, 474 F. Supp. 134, 140-141 (N.D. Ga. 1979), aff'd, 665 F.2d 616 (5th Cir. 1982), cert. denied, 456 U.S. 1008 (1983); cf. *United States* v. *Distillery in West Front Street*, 25 F. Cas. 866 (D. Del. 1870) (No. 14,965) (upholding *in rem* forfeiture over Forfeiture Clause challenge).

[20] See Exodus 21:28 ("If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."); 7 Twelve Tables 1, translated in J. Scott, *The Civil Law* 69 (1932); Oliver Wendell Holmes, *The Common Law* 8 (1881).

providing for forfeiture of property involved in criminal activity were among the earliest laws enacted by Congress,[21] and a number of current federal statutes call for the confiscation of property that is used in criminal undertakings.[22] This Court has consistently sustained the constitutionality of forfeiture laws, even when applied to the property of an owner who was uninvolved in or unaware of an act subjecting the property to confiscation, over claims that forfeiture results in a deprivation of property without due process or a taking without just compensation.[23]

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[21] See, *e.g.*, Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 39, 47 (forfeiture of ships and cargoes involved in customs violations); Act of Aug. 4, 1790, ch. 35, §§ 12-16, 22, 27-28, 67, 1 Stat. 157-159, 161, 163-164, 176 (same); Act of Mar. 22, 1794, ch. 11, 1 Stat. 347 (vessels used to deliver slaves to foreign countries); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-683 (1974).

[22] See, *e.g.*, 8 U.S.C. 1324 (conveyances used for smuggling and harboring illegal aliens); 18 U.S.C. 545 (goods smuggled into the country); 18 U.S.C. 981-982 (general forfeiture law); 18 U.S.C. 1467 (obscene material); 18 U.S.C. 2253-2254 (unlawful visual depiction of a minor); 19 U.S.C. 1497 (undeclared customs items); 19 U.S.C. 1594 (conveyances subject to penalty for violation of customs laws); 19 U.S.C. 1595a (conveyances used to smuggle items); 21 U.S.C. 853, 881 (controlled substances violations); 26 U.S.C. 7301 (revenue violations); 28 U.S.C. 2514 (fraud against the United States); 49 U.S.C. 782 (vessels used to transport controlled substances); 50 U.S.C. App. 16 (vessels used to trade with the enemy).

[23] See, *e.g.*, *Calero-Toledo*, 416 U.S. at 676-690; *Van Oster* v. *Kansas*, 272 U.S. 465 (1926); *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321, 332-333 (1926); *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 510-511 (1921); *Dobbins's Distillery* v. *United States*, 96 U.S. 395,

In light of the parallel between the RICO forfeiture statute and the forfeiture laws that have consistently been enacted and upheld since the 18th century, there is no merit to petitioner's claim that the RICO forfeiture laws constitute a facially invalid "forfeiture of estate."

B. The Forfeiture In This Case Is Not Unconstitutional

In *Harmelin* v. *Michigan*, 111 S. Ct. 2680 (1991), a plurality of the Court determined that the Cruel and Unusual Punishments Clause plays a limited role in regulating the proportionality of criminal punishments.[24] The plurality concluded that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 2705 (quoting *Solem* v. *Helm*, 463 U.S. 277, 288 (1983)). The plurality also noted that "in the rare case in which a threshold comparison of the crime committed and the sentence

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401 (1878); *United States* v. *The Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844).

[24] In *Harmelin*, this Court upheld by a 5-4 vote the sentence of life imprisonment without possibility of parole for possession of 1.5 pounds of cocaine, but the five-Member majority did not agree on a rationale. Under these circumstances, the Court has said, the judgment of the Court is the position of the three-Member plurality, since it was the narrowest rationale for the result. *Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'") (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (lead opinion)).

imposed leads to an inference of gross disproportionality" between the two, "intra- and inter-jurisdictional analyses" may be appropriate," 111 S. Ct. at 2707, in order to ensure that "proportionality review by federal courts * * * [is] informed by objective factors to the maximum extent possible," *id.* at 2704 (citations and punctuation omitted). Under that analysis, the forfeiture in this case is not unconstitutional.

1. The forfeiture in this case is not "grossly disproportionate" to petitioner's crimes

As a general matter, a forfeiture under RICO is not an unduly onerous penalty. The forfeiture of property is not comparable in severity to the punishment of death or life imprisonment. Although a forfeiture, like a fine, may "engender a significant infringement of personal freedom," forfeiture "cannot approximate in severity the loss of liberty that a prison term entails." *Blanton*, 489 U.S. at 542. A forfeiture under RICO therefore cannot be said to be remotely as severe as the penalties at issue in *Harmelin* (life imprisonment without parole); *Solem* v. *Helm*, *supra* (life imprisonment without parole); *Hutto* v. *Davis*, 454 U.S. 370 (1982) (40 years' imprisonment); and *Rummel* v. *Estelle*, 445 U.S. 263 (1980) (life imprisonment with possibility of parole).

Property can be confiscated under RICO only if it is tied to the activities of a racketeering enterprise. Accordingly, however severe may be the forfeiture of property under the racketeering laws, a person who has used property to commit a crime or acquired property with the proceeds of illegal activity has, at the very least, a vastly reduced moral claim to the

continued use or enjoyment of such property or its fruits. Cf. *Caplin & Drysdale*, 491 U.S. at 626 (robber has no right to the proceeds of his crime).

Congress "could with reason conclude" that crimes such as petitioner's are "momentous enough to warrant" forfeiture of every asset tied to his racketeering enterprise. *Harmelin*, 111 S. Ct. at 2706. It was rational for Congress to conclude that the use of a racketeering enterprise to commit crimes, particularly an enterprise as enduring as the one established and operated by petitioner, presents special risks to society not present when a person commits an isolated offense. The government's interest is similar to the one underlying recidivist laws: namely, to deal "in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276. Congress could reasonably conclude that a fitting punishment for conduct of the sort at issue in this case was to strip petitioner of his business and its proceeds to ensure that he did not profit from his crimes. See *Caplin & Drysdale*, 491 U.S. at 630; *Russello*, 464 U.S. at 28; cf. *Simon & Schuster*, 112 S. Ct. at 510.

That penalty is not rendered any less appropriate because the underlying predicate offenses were obscenity violations. Congress has treated the distribution of obscene materials as a serious offense that is inimical to "the social interest in order and morality." *Roth*, 354 U.S. at 485. Petitioner maintains that obscenity violations are not serious offenses because they are victimless crimes. Pet. Br. 45. This Court, however, rejected a similar argument in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. at 57-69, where it concluded that the States and federal government could treat obscenity violations as serious felonies notwithstanding their characterization as regulatory offenses having no direct victims.[25]

The forfeiture in this case is limited to assets that the government proved were connected to petitioner's racketeering enterprise. Pet. App. 151-160. Petitioner does not challenge the sufficiency of the government's proof regarding the racketeering activities or the enterprise, nor does he claim that the assets in question are not subject to forfeiture under the RICO statute. Under these circumstances, the forfeiture of the assets linked to petitioner's racketeering offenses cannot be said to be "grossly disproportionate" to his crimes. See *United States* v. *Grande*, 620 F.2d at 1039 ("The magnitude of the forfeiture is directly keyed to the magnitude of the defendant's interest in the enterprise conducted in violation of law.").

Petitioner maintains that the forfeiture of what he alleges is a $25 million business atop his other penalties is an unduly severe punishment for seven obscen-

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[25] Even if one accepts the moral argument that obscenity offenses, unlike property crimes and crimes against persons, ordinarily have no direct victims, it is nonetheless the case that obscenity offenses are often directly associated with, or provide sustenance to, highly dangerous criminal organizations and activities. See 2 United States Dep't of Justice, *Attorney General's Comm'n on Pornography: Final Report* 1055 (July 1986): "In addition to the myriad of other harms and anti-social effects brought about by obscenity there is a link between traditional organized crime group involvement in the obscenity business and many other types of criminal activity. Physical violence, injury, prostitution and other forms of sexual abuse are so interlinked in many cases as to be almost inseparable except according to statutory definitions." See also *id.* at 1055-1065.

ity violations. Pet. Br. 44. As we have shown, however, petitioner's offenses involved much more than the simple commission of seven obscenity offenses. Moreover, petitioner did not make a proffer in district court of the value of the forfeited assets; he cites no record evidence to support that claim, and we are aware of none. The government's valuation of the forfeited assets has not yet been completed, but it appears certain that the value of the assets will be far less than petitioner estimates.[26] Petitioner was afforded the opportunity to present evidence on the proportionality issue at two post-conviction forfeiture hearings (on May 24 and June 25, 1990), but he failed to establish a prima facie case that the forfeiture was excessive. In short, petitioner bears the burden of proving that his sentence is unconsitutional, see *Stanford* v. *Kentucky*, 492 U.S. 361, 373 (1989), and he has not met that burden.

On this record, the court of appeals was correct in declining to undertake the "proportionality review" that petitioner urges on this Court. Petitioner has failed to establish a prima facie case that the forfeiture in this case was excessive. Thus, as in *Pryba*, the only other case involving a similar forfeiture,[27] petitioner was afforded an evidentiary hearing on the issue of proportionality, but he failed to "proffer the information that would be required" to trigger a proportionality review. 900 F.2d at 757.

[26] According to a July 15, 1992, inventory of the forfeited assets that was prepared at petitioner's request by the Marshal, the government has recovered less than $1 million from the forfeiture in this case. Most of the 15 forfeited bank accounts had been closed at the time of the forfeiture, and those still active had a negligible or negative balance. Of the forfeited "businesses," 18 were essentially the same entity, representing simply the different names petitioner had assigned to his sole proprietorship over the years. As of July 15, 1992, the government had recovered only $791,489.84 from the sale of nine parcels of real estate, a public auction of personal property, a private sale of television and video cassette recorder parts, and the recovery of cash in petitioner's bank accounts and at his stores.

2. *The forfeiture in this case is not a penalty that society has rejected as too severe for crimes such as petitioner's*

Even if this Court found necessary the type of comparative analysis discussed in other cases, petitioner could not prevail. The objective evidence shows that a racketeering forfeiture is not a penalty that society has rejected as unduly severe. Forfeiture is an ancient punishment; Congress has adopted forfeiture statutes for various crimes; and 19 States impose forfeiture as a remedy for racketeering offenses based on obscenity violations. See pages 16-17, *supra*. Under these circumstances, there is no semblance of a national consensus that forfeiture of a defendant's interest in a racketeering enterprise and its proceeds is unconstitutional. Cf. *Stanford* v. *Kentucky*, 492 U.S. at 370-373.

When viewed in light of the particular facts of this case, it is even clearer that there is no national consensus barring forfeiture of the kind ordered here. The district court conducted a proportionality review

[27] In *Pryba*, the government obtained all the assets of the defendant's enterprise—three bookstores, eight video stores, and approximately $1 million in other assets—even though the proof showed that the defendants sold legally obscene materials worth a total of only $105.30. The court of appeals upheld the forfeiture because sale of the materials was part of a pattern of racketeering activity. 900 F.2d at 748.

and concluded that "the evidence demonstrates beyond a reasonable doubt that the sum sought to be forfeited is not beyond the scope of the enterprise proven." Pet. App. 159-160. In particular, the court held that the magnitude of the forfeiture was justified in light of the "enormous racketeering enterprise" that petitioner conducted over a lengthy period of time. *Id.* at 160. Petitioner did not offer in the lower court, and has not offered here, any evidence that a forfeiture of assets of the kind and size at issue in this case would be regarded in any other jurisdiction as a disproportionate penalty for offenses of the sort petitioner committed. The court of appeals therefore did not err in upholding the forfeiture against petitioner's Eighth Amendment challenge.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

MICHAEL E. O'NEILL
Attorney

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APPENDIX

1. Article III, § 3, Cl. 2, of the Constitution of the United States provides:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the person attainted.

2. The First Amendment to the Constitution of the United States provides in part:

> Congress shall make no law * * * abridging the freedom of speech[.]

3. The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. 18 U.S.C. 1962 provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. 1963 provides in part:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against;

(D) property or contractual right of any kind affording a source of influence over

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including, rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to the forfeiture under this section. * * *

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